



EUROPEAN COMMISSION

DIRECTORATE-GENERAL

TAXATION AND CUSTOMS UNION

Direct Taxation, Tax Coordination, Economic Analysis and Evaluation

Unit D1 Company Taxation Initiatives

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**SUMMARY RECORD OF THE THIRTY THIRD MEETING OF THE
EU JOINT TRANSFER PRICING FORUM**

held in Brussels on 08 March 2012

1. ADOPTION OF THE AGENDA

The agenda (doc JTPF/002/2012/EN) was adopted by consensus.

The Chair welcomed the new private sector member, Ms Astrid Pieron.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Chair reminded members that the summary record of the meeting of 26 October 2011 (doc JTPF/025/2011/EN) had been adopted under written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

Thomas Neale provided information on the state of play of the following topics:

- He reminded the JTPF members of the need to adopt the report on CCAs in June, in order to allow the Commission to issue a communication and submit it to the Council before the end of 2012.
- The technical work around the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) is progressing and all chapters other than those relating to consolidation have now been discussed.
- Following last year's public consultation on double taxation, the Commission has published a public consultation on double non taxation. It is available for comments on the Commission website:

http://ec.europa.eu/taxation_customs/common/consultations/tax/2012_double_non_taxation_en.htm .

- The General Secretariat of the Council has issued a request (through the Permanent Representations) to update the list and the CVs of the independent persons of standing eligible to become a member of the Advisory Commission.
- The Commission has provided funding to the UN for the editing of the UN manual on TP.

4. COST CONTRIBUTION ARRANGEMENTS

After introducing the documents JTPF/020/REV2/2011/EN and JTPF/006/BACK/2012/EN, the Chair opened the discussion by inviting the two Vice Chairs to present the issues discussed during the pre-meetings by MS' tax administrations (TAs) and by private sector members (PSM), respectively.

Outcome of the pre-meetings

MS' tax administrations' can agree with PSM proposals on the issues of "sharing of skills and knowledge" and "the kind and degree of active participation". On the need for contracts and how to measure contributions in kind, some drafting suggestions were circulated during the meeting.

Private sector members' discussions were focussed on how to ensure that the CCA document is simple and practical to facilitate reviewers' work. The report should aim at providing guidance on the practical aspects rather than being used for differentiating CCAs from other forms of agreements relating to services.

The Chair mentioned that the document contains several mere drafting suggestions which would be regarded as acceptable as long as nobody objects when the respective paragraphs are under consideration.

The Chair's suggestion to continue the discussion by addressing the issues outlined in the boxes after each paragraph was followed and resulted in the following outcome:

First part of the document (paragraphs already discussed in October)

Section 1: Introduction

Paragraph 4:

A member's suggestion to clarify that the scope of the document does not cover VAT was not adopted. It was not considered necessary, as the general mandate of the JTPF relates to direct taxation and such a statement had not been made in other JTPF documents.

Section 2: Terminology

Paragraph 7:

It was agreed to maintain the wording of the paragraph and to present it as a quotation of the OECD TPG (paragraph 8.3).

Paragraph 11:

It was agreed to keep the second sentence and to end the paragraph after the word "*concepts*" in the last sentence.

Box 1: on CCAs, the content will end after "*or in kind*"; on IGS, the last sentence containing a reference to the mark-up will be deleted.

Box 3: the first sentence will read as follows: "*Written agreements are highly recommended for reasons of having the CCA accepted or recognised by tax administrations. They are even compulsory in some MS*". In the second sentence the word "*sufficient*" is replaced by "*appropriate*".

Box 4: the agreed text reads as follows: "*As all participants are contributing to a common activity and share costs and the contributions reflect the expected benefits, contributions are usually valued at costs.*" (See also paragraph 42).

Box 5: the word "*repartition*" is replaced by "*allocation*".

Paragraph 12

This paragraph will be deleted.

Section 3: Scope

Paragraph 14:

It was agreed that the text between brackets will be deleted. However, one TA reiterated its preference for keeping it.

Section 4: General features

Paragraph 16:

The drafting proposals in the text of paragraph 16 were adopted. For sub items iii) and iv) the following revised drafting was agreed:

iii) "*the terms of a CCA should generally be agreed prior to the beginning of the activity*"

iv) "*the terms of a CCA should be at arm's length taking into account the circumstances known or reasonably foreseeable at the time of entry into the arrangement*".

In sub item viii) the second sentence will be deleted.

In sub item x) the sentence should end after the word "*principle*".

Paragraph 17:

The second sentence ("*Such differences are not uncommon.*") will be deleted.

Paragraph 19

The group discussed the PSM suggestion to add a sentence to limit the need to demonstrate the benefit for every participant and every activity. The group decided in the end not to include it. PSM did not insist as they consider that a CCA is one agreement and therefore the benefit is globally assessed and allocated to participants via an appropriate allocation key.

It was agreed to amend the last sentence on the use of hindsight in accordance with the language used in the OECD TPG, i.e. "*care should be taken to avoid the use of hindsight*".

Paragraph 20

The Forum discussed a TA's suggestion and concluded that it was sufficiently addressed in the paragraph.

Paragraph 42

(This paragraph was discussed at the same time as box 4 of paragraph 11. Therefore and for reasons of clarity we have included it under the "first part" of the document.)

With respect to the issue on whether contributions should be measured at costs or at market value the Forum agreed on the following drafting subject to a scrutiny reservation by one member:

"The value of each participant's contribution must be consistent with the value that independent parties would have agreed to in comparable situations. No specific result can be provided for determining participant's contributions in all situations, but rather the question must be resolved on a case by case basis consistent with the general operation of the arm's length principle. With respect to CCAs in general, countries have experience both with the use of costs and with the use of market prices for the purposes of measuring value of the contributions to arm's length CCAs (paragraph 8.15 OECD TPG). However, for the type of CCAs covered by this document, it is assumed that there is often a small difference between pricing at costs and at market value and it is therefore recommended for practical reasons to value the contributions at costs".

Second part of the document

After discussing the first part of the document, the Group continued with an exchange of views on the questions raised in the second - not yet discussed - part of the document. The Chair noted that the discussion on those questions should provide the Secretariat

with an overview on the Forum's positions that will then be reflected in the redraft of the document.

Section 4, General Features Q1 – Q3:

In referring to the fact that a formal contract would not be required, the Forum concluded on Q1 that the term "*revision clause*" would not be appropriate. What the report should reflect is that such clause is not a pre-requisite and its absence should not disqualify the agreement to be at arm's length. The changes to such an agreement need to be documented properly and should be appropriately reflected in any written agreement. The Secretariat was asked to reflect those conclusions in the redraft of the document. For the redraft also the language used by the OECD should be considered and care should be taken that the guidance given by the JTPF is not stricter than the one used by the OECD.

The OECD mentioned that the currently quite negative language of the OECD TPG towards the use of safe harbours will probably be revised. The Forum supported on Q2 the idea of evaluating what kind of safe harbours could be suggested in this report. In this context, reference was made to the IGS guidelines and to the SME report. However, the group also recognised that because this document considers costs rather than market value, the scope for safe harbours may be limited. With respect to a TA's suggestion concerning the scope for action, the Secretariat confirmed that such an approach would fall under the JTPF mandate.

On Q3 the Forum concluded that a participant to a CCA can engage a separate entity to perform all or part of its activities and that this should be reflected somewhere in the text.

Section 5, Content of the narrative

Q 4 and Q5::

The general conclusions by the Forum on the narrative were that the information required should aim at facilitating the reviewers' task. For CCAs on services not creating IP, this may involve providing information that may differ from the one listed under the OECD TPG for CCAs in general, and from that in the IGS Guidelines. The Secretariat was requested to rearrange and merge some items of the list.

Section 6.1, The "expected benefit" test

Q6 – Q8:

As a more general point PSM stressed that the drafting of paragraphs 28 – 31 has a flavour of requiring too much information on the expected benefit from each individual entity's perspective and the paragraphs should therefore be softened in accordance with the discussion on paragraph 19, i.e. focussing more on the benefit the CCA provides in total. Further a duplication of what is already said in paragraph 16 should be avoided.

With respect to Q6 the Forum concluded that paragraph 29 would need a redrafting to cover that a participant in a CCA may also benefit from an increase of profit without necessarily having an increase of income. Further it should be mentioned that the fact

that profit or income can be maintained could also be considered as a benefit. Given the difficulty of clearly distinguishing between what is meant by qualitative and quantitative approach to assess the benefit, the Forum concluded on Q7 that this distinction should not be made. The main point is that there is an economic benefit as described in paragraph 29. Regarding the issue on how often the expected benefit should be reassessed (Q8) the Forum agreed on adding *"/appropriate monitoring"* after *"setting up"* in the first sentence of paragraph 28.

Section 6.2, Contributions of each participant

Q9 – Q15:

On Q9 the Forum decided to draft the guidance on allocation keys along the lines of paragraph 47 -53 of the IGS Guidelines and to suggest some allocation keys. Possible allocation keys may be taken from the PSM's examples and other guidance available in this respect.

On Q10, the wording of the question will be incorporated in the text. The PSM's suggestion to replace *"major difficulties"* by *"key elements"* in paragraph 32 was adopted.

The Forum did not support the suggestion in Q 11.

On Q12, the Forum concluded that the general consideration on when budgeted and actual costs are used is already made in paragraph 34. The Secretariat will propose drafting to address how the compensation between budgeted and actual costs should be made, i.e. retrospectively or prospectively. The following general issue was raised: the implications of the existence of different levels of costs among MS on the measurement of contributions in kind. One MS offered further elaborating this issue in a written comment.

(Q13) suggests that the contribution of a certain participant is based on international accounting standards rather than on a calculation based on its own – national - accounting standards for determining the contributions in kind. It was recommended to accept the standards used by the MNE but that each MS should be allowed to require adjustments in case there are major differences to the domestic accounting standards over the duration of the CCA. In this context PSM highlighted that also third parties would generally agree on a common set of rules to determine the costs of their contributions. The Secretariat will reflect this tentative agreement in the next draft of the report

The Forum did not support the suggestion in Q14 to use external auditors.

Q15 suggests specific recommendations about relevant allocable costs and especially the treatment of tax incentives and subsidies. Although it was concluded that the treatment of subsidies would generally follow from how third parties behave, the Forum recognised that it might be difficult to reach an agreement on this issue as being related to the issues on location savings and bargaining power. The Forum recognised that the issue was not especially linked to this project and it might bring undesired complications to it. The Chair mentioned that it might as well become a separate item of the future work programme.

Section 6.3, Anticipated benefit vs. actual

Q16 – Q17:

Paragraphs 37 – 40 were accepted (Q16 and Q17) subject to consequential changes to the parts addressing "revision clauses". For example, on 40, the last sentence will be deleted.

Section 6.4, Participation in a CCA

Q18:

The Forum agreed on keeping Paragraph 41 but redrafting the language on "*profit element*" and referring to normal principles (not restrict the drafting to IGS guidelines)..

Paragraph 42 was already redrafted earlier (see above).

Section 6.5, Joining/Leaving a CCA

Q19:

The Forum agreed to the conclusions in paragraphs 43 – 45.

Section 6.6, Documentation

Q20 – Q21:

On Q20 the Forum concluded that, taking into account that the point addressed here is also covered by Section 5 (Narrative), there is no need to further develop this chapter.

On Q21 the Forum saw no need for including terminated CCAs (as no IP is involved).

Section 6.7, Post review considerations

Q22 – Q24:

The Forum recognised the practical issue arising from the generally multilateral character of a CCA. If one MS challenges the participation or contribution allocated to the participant located in its territory there is an effect on all the other MS where participants in the CCA are located. This may result in many bilateral or complex multilateral disputes. Although the general value of APA for avoiding those disputes was highlighted, it was recognised that the administrative complexity would not be removed by an APA. Further there were doubts on whether CCAs on services not creating any IP as discussed in this document would justify such a complex APA procedure. The Forum stressed that especially this feature of multilateral implication underlines the value of this report as providing guidance on the various technical features and the documentation of a CCA on services not creating IP. The complexity of dispute resolution in this area is expected to encourage business to follow this guidance when implementing/documenting

a CCA. The guidance given would further provide a risk management tool to tax administrations that helps avoiding unnecessary disputes. The Forum agreed that the report should cover this message.

On CCAs, the follow up procedure was agreed as follows:

After the summary record of the meeting has been approved, the Secretariat will circulate a document redrafted in accordance with the outcome of this meeting, for written comments. These will be implemented in a further revised draft that will form the basis for the discussion at the June meeting.

5. SECONDARY ADJUSTMENTS

Based on the Chair's suggestion, the Forum agreed that the completion of the state of play already constitutes the accomplishment of a part of the work programme. Based on several proposals received by members, it was agreed to continue the discussion on the additional options, if possible at the next meeting. Those members who have not sent a reply (and have a preferred option) are invited to do so as soon as possible. The Secretariat will draft a discussion paper with the suggestions received and will also include some aspects relating to the Parent Subsidiary Directive.

6. RISK ASSESSMENT

The UK and Austria presented their approaches to risk assessment to the Forum. Due to time constraints, it was not possible to discuss the presentations, nor the topic itself or a possible way forward. This was postponed to one of the following meetings. Given that risk assessment is/was also addressed at other fora, the Chair asked the Secretariat to prepare a general state of play containing, for example, a summary of what is/has been undertaken at OECD/EU level and perhaps some proposals for a potential scope (if any) for an EU approach.

7. IMPROVEMENTS IN THE COLLECTION OF STATISTICS ON MAPs

The Chair recalled the importance of this point, and linked it to the 10th anniversary of the JTPF in October this year. The Vice Chair representing TAs informed the Forum that, although MS had expressed a slight preference for one option, it was recommended not to confirm it before bilateral contacts are taken with the OECD's WP1 to seek further alignment between both approaches. The Forum agreed that the 2011 statistics would be provided in the improved original format (Option 1). The Chair requested the Secretariat to launch the 2011 questionnaire in March.

8. MONITORING

8.1 List of independent persons

On 23 February the Council circulated a letter to the Fiscal Attachés requesting MS to update the list and the related information by 23 March.

8.2 APA Statistics

The Vice Chair representing the TAs confirmed that TAs had agreed on the proposed guidance regarding the APA statistics. The Chair requested the Secretariat to launch the 2011 APA Questionnaire as soon as possible.

9. ANY OTHER BUSINESS

Given the relatively short time frame available before the next meeting and the procedure envisaged with respect to the CCA report, the Forum agreed to the Secretariat's suggestion to shorten the deadline for comments to the summary record of this meeting from 30 to 15 days.

The next meetings in 2012 are scheduled for 7 June and 18 October. The main focus of the June meeting will be the finalisation of the CCA report.